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Sterling B. Cannon, George H. Maxwell, Dave Davis, Art Van Luyx, and Terry Teeples v. Stevens Schools of Business, Inc. : Petition for Rehearing

Utah Supreme Court

Del B. Rowe; Attorney for Respondents.
Bryce E. Roe; Roe and Fowler; Attorneys for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

STERLING B. CANNON, GEORGE H. MAXWELL, DAVE DAVIS, ART VAN LUYK, and TERRY TEEPLES,

Plaintiffs and Respondents,

vs.

STEVENS SCHOOLS OF BUSINESS, INC.,

Defendant and Appellant.

Case No. 14378

APPELLANT'S PETITION FOR RE-HEARING AND SUPPORTING BRIEF

Appeal from a Judgment of the District Court
of Salt Lake County
Honorable Stewart M. Hanson, Sr., Judge

Bryce E. Roe
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Appellant

Del B. Rowe
425 South 400 East
Salt Lake City, Utah 84111
Attorney for Respondents

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AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

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APPELLANT'S PETITION FOR RE-HEARING
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PETITION FOR RE-HEARING

Stevens Schools of Business, Inc., defendant and appellant herein, respectfully petitions the court for a re-hearing on the following grounds:

1. A justice of the court who did not hear the oral argument should not have participated in the decision.

2. The court misconceived the facts in stating that amounts claimed by the plaintiffs were payable from a special fund.

3. The court failed to consider the authorities relied upon by the appellant and failed to decide the primary issue in the case.

4. The court's holding with respect to accord and satisfaction violated accepted principles of contract interpretation.

BRIEF IN SUPPORT OF PETITION FOR RE-HEARING

NATURE OF CASE

This is an action by five former employees against an employer for commissions claimed to have accrued after the employer ceased doing business.

DISPOSITION IN LOWER COURT

The court entered judgment in favor of the plaintiffs and against defendant for $35,329.74.

RELIEF SOUGHT ON PETITION FOR RE-HEARING

Defendant and appellant asks the court to grant its petition for re-hearing, set the case for reargument, and reverse the judgment of the trial court.

STATEMENT OF FACTS

Plaintiffs were employed by the defendant as salesmen, whose duties included visiting various high schools and enrolling students (Tr. 14). In December 1973, the defendant closed the school it had been operating in Salt Lake City, and sold the assets of the school it was operating in Ogden. Thereafter the plaintiffs brought this action claiming they were entitled to the commissions they would have earned if the defendant had continued operation of the two schools.

Prior to the bringing of the action, three of the plaintiffs had endorsed and cashed checks which were tendered to them in full payment of any claims against the defendant.

ARGUMENT

I

A justice of the court who did not hear the oral argument should not have participated in the decision.

In accordance with the rule of the court, oral argument was requested, and the court convened on December 17, 1976, to hear the argument. At that time, the court was composed of Chief Justice Henriod and Justices Crockett, Ellett, Maughan, and Wilkins. Justice Henriod, however, did not participate in the decision and Justice Hall did. Article VIII, Section 2, Utah Constitution, provides:

> The Supreme Court shall consist of five judges, which number may be increased or decreased by the legislature, but no alteration or increase shall have the effect of removing a judge from office. A majority of the judgdes constituting the court shall be necessary to form a quorum or render a decision. If a justice of the Supreme Court shall be disqualified from sitting in a case before said court, the remaining judges shall call a district judge to sit with them on the hearing of such cause. * * * (Emphasis added)

At the time of the argument, Cheif Justice Henriod had announced his retirement from the court, and it might have been anticipated that he would not participate in the decision. That being the case, he should have disqualified himself from sitting

and the court should have followed the mandate of Article VIII, Section 2, and appointed a district judge to sit with them on the hearing of the case.

The failure to appoint a district judge deprived the appellant of the right to have all of the judges participate in the decision-making process, and in the give and take following oral argument of the cause. For this reason, the court should grant a petition for re-hearing and permit the parties to argue the case before all of the justices who will participate in the decision.

II

The court misconceived the facts in stating that amounts claimed by the plaintiffs were payable from a special fund.

In its opinion, this court cited Navajo Freight Lines, Inc. v. Moore, 170 Colo. 539, 463 P.2d 460, 462 (1970), in support of the proposition that where compensation for services rendered is to be paid out of a fund to be collected by the party for whom such services were rendered "there is an implied obligation on the part of the promisor to exercise reasonable diligence to collect the fund from which the promisees may be compensated for such services."

The Navajo Freight Line case is not in point. In that case the defendant had agreed to pay his auditors a percentage of the additional accounts receivable collected as a result of certain work done by the auditors. The auditors brought

suit seeking recovery of a percentage of all of the accounts that it had retrieved for the defendant to collect. The court, in passing, recited the language set out above, but held for the defendant.

In this case there was no fund which the defendant had any right to collect. The student enrollments taken by the defendant were quarter-by-quarter, and there was no indebtedness owed by any of the students for whom the plaintiffs seek compensation. Therefore the "special fund" concept has no application to this case.

Moreover, the court states bluntly that the action of the defendant in suspending the schools was "voluntary." This is a question of fact which should be sent to the trial court for determination. The voluntariness of the defendant's action is subject to serious dispute. During the year 1973, the year the Salt Lake City school was closed and the Ogden school sold, the defendant had suffered an operational loss of $143,000 (Tr. 262). Closing the doors of the schools under these circumstances can hardly be considered to be "voluntary," but should be deemed to be compelled by the force of circumstances over which the defendant had no control. At the very least, this is an issue that should be given back to the trial court for a finding.

III

The court failed to consider the authorities relied upon by the appellant and failed to decide the primary issue in the case.

In presenting this case to the court, the defendant relied on a series of cases that were directly in point. People of the State of Illinois v. Peoria Life Insurance Co. (Harwick v. O'Hern), 376 Ill. 517, 34 N.E.2d 829, 136 A.L.R. 151 (1941); Layton v. Illinois Life Insurance Co. (Backman v. Davis), 81 F.2d 600 (7 Cir. 1936); Moore v. Security Trust and Life Insurance Company, 168 F 496 (8 Cir. 1909); and others.

The above cases dealt specifically with the primary issue in this case: whether a company which has promised renewal commissions to salesmen is obligated to continue to pay those commissions if the company goes out of business. As pointed out by the court in Moore v. Security Trust and Life Insurance Company:

> The existence of this right in the defendant [to manage, control, continue, or terminate its business at will] and its free and continuous exercise were implied in this contract of agency, and the plaintiff's took the chances of its exercise when they signed the agreement and entered upon their service under it.

In writing its decision this court ignored the whole theory upon which the defendant's appeal was based, and in so doing it did not mention a single one of the cases upon

which the defendant relied, let alone attempt to distinguish them or show the basis for their non-applicability. Instead, the court relied upon some general but inappropriate language about excuse of conditions and voluntary acts.

IV

The court's holding with respect to accord and satisfaction violated accepted principles of contract interpretation.

In ruling upon the issue of accord and satisfaction, the court announced a rule which will have the effect of returning litigants to the era of Groucho Marx, where they win the prize only if they happen to say the magic word.

Checks sent to three of the plaintiffs contained the following endorsements:

> Endorsement of this check constitutes acknowledgement of the termination effective 12-31-73, of my employment agreement with Stevens-Henager College dated [date], and constitutes final and full payment by Stevens-Henager College to me in settlement of any and all obligation due me from Stevens-Henager College. (Emphasis added)

Citing Hintze v. Seaich, 20 Utah 2d 275, 283, 437 P.2d 202 (1968), the court stated that:

> Neither by the statement on the check or by other communication did defendant express the intention the payment was offered upon the condition that it be accepted in full satisfaction or not at all.

In the present case, the only way it could have been plainer that the check was tendered in full satisfaction or not at all would have been to add the magic words, "This check may be accepted only in full satisfaction or not at all." But rules of contract interpretation have never required statements of that type if the intent of the parties, viewed objectively, can be gleaned from the language used.

The standard of interpretation of unintegrated agreements is set out in 1 Restatement of Contracts, § 233 as follows:

> Where there is no integration, words or other manifestations of intention forming an agreement, or having reference to the formation of an agreement, are given the meaning which the party making the manifestation should reasonably expect that the other party would give them * * *

Under the provisions of 1 Restatement of Contracts, § 231, the rule of interpretation applies to integrated agreements, also, where they are ambiguous or uncertain.

It is difficult to conceive how any reasonable, objective, person could read the endorsement placed on the check by the defendant without coming the conclusion that the defendant intended that if the check were cashed, all disputes and claims as between the parties would be fully compromised and settled. The language is quite unlike that in Hintze v. Seaich where a check was sent to the plaintiff with a statement that "this is the balance of your account in full." That statement can be interpreted as a simple statement of expectation by the one party, but not clearly

a statement that the check is tendered only on condition that it be accepted in full settlement. The endorsement placed on the checks in this case by the defendant cannot be interpreted in any other way. "Endorsement * * * constitutes final and full payment * * * in settlement of any and all obligations due me from Stevens-Henager College." How could it be clearer?

Moreover, the evidence is that the plaintiffs knew exactly what the contracts meant. In holding the contrary, the court relies upon the findings of the trial court, but pays no attention to the testimony of the plaintiffs. The addition of modifying language by two of the plaintiffs is pretty clear evidence that they knew what the defendant was saying. Two of the plaintiffs changed the language on the endorsement, the other one endorsed the check and presented it for payment believing that he had additional claims for commissions against the defendant (Tr. 229). Mr. Teeples testified that he took the endorsement to be an attempt on the part of Stevens to wipe out the sums of future commissions (Tr. 189).

Accordingly we not only have a situation in which the language used by the defendant was clear and unequivocal, but one in which the plaintiffs who cashed the checks understood what the defendant was saying, understood it as defendant understood it, and should be bound by it.

CONCLUSION

Because the case was erroneously decided, the court misconceived the facts, and because one of the justices who participated in the decision did not hear the oral argument, a re-hearing should be granted and the judgment of the trial court should be reversed.

Respectfully submitted,

Bryce E. Roe (Signed)

Bryce E. Roe
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Appellant

CERTIFICATE OF MAILING

Copy of the foregoing Appellant's Petition for Re-Hearing and Supporting Brief was mailed, postage prepaid, this 29th day of March, 1977, to Del B. Rowe, 425 South 400 East, Salt Lake City, Utah 84111, attorney for respondents.

Bryce E. Roe (Signed)